89- 1432

NO. 89-

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

WAYNE P. JACKSON,

Petitioner,

vs.

JOHNSTOWN/CONSOLIDATED REALTY TRUST and TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Respondents.

Petition for a Writ of Certiorari to the Appellate Court of Illinois, First District, Fourth Division

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March 1990

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QUESTIONS PRESENTED

It is settled by decision of this Court in *Butner v. United States*, 440 U.S. 48 (1979), that state law governs rights in real property of a debtor in bankruptcy. This case presents the following questions:

1. May a state court, acting on the authority of an order of the bankruptcy court, purportedly entered under 11 U.S.C. § 105 as a matter of federal equity law, suspend or nullify the state constitution, which explicitly prohibits judicial sales of real estate by private commissioners or fee officers, and thereby sustain a judicial sale of real estate not conducted in accord with applicable state law?

2. In light of the conflict with the *Butner* decision should this Court exercise its authority under Sup. Ct. R. 16.1 (previously 23.1) to grant certiorari and simultaneously grant summary disposition on the merits and vacate, reverse and remand?

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INTRODUCTORY STATEMENT

Wayne P. Jackson petitions this Court for a writ of certiorari to review the judgment and opinion of the Appellate Court of Illinois, First District, Fourth Division.

OPINION BELOW

The opinion of the Appellate Court of Illinois, First District, Fourth Division is reported at 185 Ill. App. 3d 734, 542

N.E.2d 30, 1989 Ill. App. Lexis 930, and at 134 Ill. Dec. 30 (1989), and is appended hereto as pages A.1 to A.7. The order and mandate of the Supreme Court of Illinois denying Petitioner's Petition for Leave to Appeal appears at pages A.8 – A.9.

JURISDICTION

The Judgment of the Appellate Court of Illinois, First District, Fourth Division was entered on June 22, 1989. Petitioner's timely Petition for Leave to Appeal was denied by the Supreme Court of Illinois on December 5, 1989 and this Petition for Certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

QUESTIONS PRESENTED

It is settled by decision of this Court in *Butner v. United States*, 440 U.S. 48 (1979), that state law governs rights in real property of a debtor in bankruptcy. This case presents the following questions:

1. May a state court, acting on the authority of an order of the bankruptcy court, purportedly entered under 11 U.S.C. § 105 as a matter of federal equity law, suspend or nullify the state constitution, which explicitly prohibits judicial sales of real estate by private commissioners or fee officers, and thereby sustain a judicial sale of real estate not conducted in accord with applicable state law?

2. In light of the conflict with the *Butner* decision should this Court exercise its authority under Sup. Ct. R. 23.1 to grant certiorari and simultaneously grant summary disposition on the merits and vacate, reverse and remand?

LIST OF PARTIES

The parties to the proceedings in the Illinois Appellate Court were the petitioner, Wayne P. Jackson, and the respondents Johnstown/Consolidated Realty Trust and Trustees of Central States, Southeast and Southwest Areas Pension Fund. The parties before this Court are the same.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 8, cl. 4

> Section 8. The Congress shall have Power
> . . . To establish an uniform Rule of Naturalization, and uniform Laws on the subject of Bankruptcies throughout the United States;

IL. CONST. art. VI, § 14

> **Section 14. Judicial Salaries and Expenses—Fee Officers Eliminated**
>
> Judges shall receive salaries provided by law which shall not be diminished to take effect during their terms of office. All salaries and such expenses as may be provided by law shall be paid by the State, except that Appellate, Circuit and Associate Judges shall receive such additional compensation from counties within their district or circuit as may be provided by law. There shall be no fee officers in the judicial system.

STATUTES

Effective until 30 days after October 27, 1986:

92 Stat. 2555, 11 U.S.C. § 105. Power of court:

> (a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title.

Effective 30 days after October 27, 1986:

100 Stat. 554, 11 U.S.C. § 105. Power of court:

> (a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

STATEMENT OF THE CASE

The underlying action was a mortgage foreclosure action filed on January 3, 1986 in the Circuit Court of Cook County, Illinois, brought initially by the Trustees of Central States, Southeast and Southwest Area Pension Fund. Record in the Appellate Court of Illinois ("C") C 02-67. Thereafter, on February 5, 1986 Johnstown/Consolidated Realty Trust f/k/a Consolidated Capital Income Opportunity Trust, the other mortgagee Respondent, filed its counterclaim to foreclose its junior mortgage. (C 78 – 148.) The security for the mortgages was a multi-story commercial office building in the Chicago Loop. Petitioner, Major General Wayne P. Jackson, U.S.A.R. Ret., was not expressly named as a defendant but was legally included within the category of "unknown owners and non-record claimants," named as defendants. Title to the real estate was held in two Illinois land trusts. (C 05.) The land was owned by LaSalle National Bank as a land trustee, the building and other improvements on the land were owned by American National Bank as land trustee. (C 02.) The beneficial interest in the trust owning the building was held by 29 East Madison Associates, an Illinois Limited Partnership, of which partnership Wayne P. Jackson was the general partner.

On February 13, 1986, 29 East Madison Associates sought protection from creditors and initiated a voluntary Petition for Relief in the United States Bankruptcy Court for the Northern District of Illinois under Chapter 11. (Case No. 86 B 2240). On April 29, 1986, an order agreed to by counsel for the parties, including counsel then representing 29 East Madison Associates, was entered in the bankruptcy court. (C 467 – 484.) The order included several Exhibits (C 485 – 510) including Exhibit B, an order (C 486 – 499) to be entered in state court and providing for lifting the automatic stay as to the foreclosure action against the commercial building (A.10) and entry of an order in state court resulting in a public, judicial, auction sale of the property conducted in the bankruptcy courtroom, by "a commissioner." On June 13, 1986, the state court order authorizing the sale was entered, (C 605 – 617) (A.10) and on July 24, 1986, the sale was conducted. Both orders were drafted by counsel for Respondents. The sale produced a bid of $10,400,000.00, by Respondent Johnstown/Consolidated. (C 806 – 807.) The trial court received a "Commissioner's Report of Sale and Distribution," (C 829 – 832) which revealed a "Commissioner's Fee" of $3,058.00 paid to the Commissioner. (C 831.) The trial court confirmed the results of the sale on September 3, 1986, over objections by defendants other than Petitioner, on bases other than those raised herein by Petitioner. On September 17, 1986 the Verified Second Report of Mortgagee in Possession Consolidated Capital Income Opportunity Trust, was filed (C 990 – 1001.)

Thereafter, Wayne P. Jackson filed a timely petition under Ill. Rev. Stat. Ch. 110, § 2-1401 on December 16, 1986, (C 1006) to void the commissioner's sale and he amended the petition on January 15, 1987. (C 1125 – 1131.) The amended petition first raised the question of the absence of authority

on the part of the state court to appoint a commissioner to conduct a foreclosure sale. On March 31, 1987 the trial court denied Jackson's Amended Petition to void a portion of the Foreclosure Decree. (C 1262.)

HOW THE FEDERAL QUESTION WAS PRESENTED

The Federal question was first presented by Respondents in their brief in the Illinois Appellate Court. The Illinois Appellate Court entertained and decided the Federal question.

Prior to that point in the case Petitioner had focused on the clearly void nature of the sale under state property law. He presented his contentions to the trial judge in his amended § 2-1401 petition (C 1125 – 1131.) The Amended Petition set forth that the Illinois Constitution had been violated by the manner in which the sale had been conducted. The trial court denied the Amended Petition. (C 1262.)

In the Illinois Appellate Court Petitioner again presented his claim that the sale had been conducted in violation of the Illinois Constitution. At this point in the case, after Respondents had seen Petitioner's arguments and authorities, Respondents first argued that the Illinois constitutional question was not dispositive, but rather that the preemptive authority of the Federal Bankruptcy Court was dispositive. Accordingly, the Defendants, in their brief, added what they stated to be a preemptive federal issue. The Respondents argued that state law made no difference, that the entire issue was resolved by federal law. (A.11 – A.12.)

Specifically, Respondents asserted that the Bankruptcy Order entered by Bankruptcy Judge Eisen meant that "Regardless of the propriety of a sale by a commissioner under Illinois law, the Agreed Bankruptcy Order supersedes any applicable state law and therefore validates the appointment

of a commissioner." The Respondents went on to argue: "Federal bankruptcy law clearly supersedes state law."

The court's ruling embracing the federal issue stated that the order entered in Federal bankruptcy court superseded the applicable state law regardless of any alleged impropriety of the sale by an appointed commissioner. (A.5.)

The federal question was set forth in the Petition for Leave to Appeal filed with the Illinois Supreme Court which stated:

> The State of Illinois Constitution of 1970 provides, in part, at Article VI, § 14 that: "There shall be no fee officers in the judicial system." The petitioner collaterally attacked, as void, a portion of the trial court's judgment of foreclosure and sale which provided for the sale to be conducted by a commissioner appointed by the trial court. The Appellate Court did not void that portion of the judgement [sic] order, based on:
>
> (a) A state court referencing a chancery matter to a special commissioner is, at most, voidable.
>
> (b) The agreed bankruptcy order supervisionally reviewed by the Federal Bankruptcy Court validates the appointment of a commissioner, even if prohibited by the Illinois Constitution.
>
> (c) A Federal Bankruptcy Court may order a state court to enter a judgment containing a Constitutionally prohibited appointment in order to enforce the provisions [sic] of the bankruptcy court.
>
> (d) An agreed bankruptcy order supersedes applicable state law irrespective of the impropriety of a state court appointing a fee officer.

That Petition was denied by the Illinois Supreme Court on December 5, 1989. (A.8 – A.9.) Thus, the Illinois Court of Appeals, First District, Fourth Division, is the "highest court of [the] State in which a decision could be had." 28 U.S.C. § 1257(a).

REASONS FOR GRANTING THE WRIT

1. The Decision Below Is Contrary to *Butner v. United States*

The relationship between state property law and the federal bankruptcy power has produced substantial litigation and commentary.[1] This Court settled the basic principles in this area in *Butner v. United States,* 440 U.S. 48 (1979). The Bankruptcy Act leaves the determination of property rights to state law. Accordingly, this case falls squarely within the scope of Sup. Ct. R. 17.1(c), a state court has decided a federal question in a way in conflict with applicable decisions of this Court.

In *Butner v. United States, supra,* the Court was faced with the question of whether the right to rents between the date of the mortgagor's bankruptcy and the foreclosure sale of the mortgaged property was determined by a federal rule of equity or by the law of the state where the property was located. The Court granted certiorari not to resolve issues of North Carolina law, but rather to resolve a conflict between Circuits. (440 U.S., at 51-52.) So too, in the instant case Petitioner does not seek resolution by this Court of the contested issues of Illinois law, but rather that this Court resolve the conflict between the Appellate Court's ruling and *Butner.*

This Court ruled :

> . . . Congress has generally left the determination of property rights in the assets of a bankrupt's estate to state law. [footnote omitted]

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[1]Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren,* 54 U. Chi. L. Rev. 815 (1987); Baird & Jackson, *Corporate Reorganizations and the Treatment of Diverse Ownership Interests: a Comment on Adequate Protection of Secured Creditors in Bankruptcy,* 51 U. Chi. L. Rev. 97 (1984); Jackson, *Bankruptcy, Non-Bankruptcy, Entitlements and the Creditors' Bargin,* 91 Yale L.J. 857 (1982)

> . . . Property interests are created and defined by state law. Unless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding. Uniform treatment of property interests by both state and federal courts within a State serves to reduce uncertainty, to discourage forum shopping, and to prevent a party from receiving 'a windfall merely by reason of the happenstance of bankruptcy.'

Butner v. United States, 440 U.S. 48 (1979), at 54-55.

In holding that state law must apply this Court said:

> The rule of the Third and Seventh Circuits, at least in some circumstances, affords the mortgagee rights that are not his as a matter of state law. The rule we adopt avoids this inequity because it looks to state law to define the security interest of the mortgagee.

Butner v. United States, 440 U.S. 48 (1979), at 56.

The Court affirmed the position of the Second, Fourth, Sixth, Eighth and Ninth Circuits, and declined to review the state law questions which the parties had briefed. (id. 58.)

In *Stellwagen v. Clum,* 245 U.S. 605 (1918), the underpinnings of the *Butner* decision are found. In *Stellwagen,* the Court was confronted with the claim that certain Ohio statutes relating to the validity of transactions made in contemplation of insolvency, were suspended by the Bankruptcy Act. (245 U. S. at 610.) The Court sustained the continued effectiveness of the Ohio statutes. The Court rejected the contention that bankruptcy law would sustain transactions " . . . voidable under the laws of the State where . . . made . . . " (245 U.S. at 617.) *Butner* is of continuing vitality, having been cited over 100 times. Circuit courts have affirmed its applicability under the new bankruptcy code. *Justice v. Valley Nat. Bank,* 849 F.2d 1078, 1084, 1087, 1088 (8th Cir. 1988); *Saline State Bank v. Mahloch,* 834 F.2d 690

(8th Cir. 1987) in which the court held: "After *Butner v. United States*, . . . the rights of a secured creditor must be determined according to the applicable non-bankruptcy law of the state wherein the debt arises." (834 F.2d at 692.)

However, in the instant case, the Illinois Appellate Court ruled squarely against the *Butner* holding, stating:

> We, therefore, find that the appointment of the commissioner pursuant to the agreed bankruptcy order entered by the Federal bankruptcy court was valid even if the Illinois Constitution were to be construed so as to prohibit the appointment of the commissioner in these circumstances. (A.6.)

Proceeding further in the wrong direction, the Illinois Appellate Court, (A.5) cites 11 U.S.C.A. § 105(a) (West Supp. 1989) as authority for its decision sustaining the June 13, 1986 state court order appointing the commissioner. (A.10.) Which order in turn found its genesis as an attachment to the Bankruptcy Court order of April 28, 1986. (A.10.) However, the language from 11 U.S.C.A § 105(a) quoted by the Illinois Appellate Court was for the most part not in existence at the time the order in question was entered. Most of the language quoted by the Illinois Appellate Court was enacted by Congress effective 30 days after October 27, 1986.[2] Furthermore, as required by *In re Casgul of Nevada, Inc.*, 22 B.R. 65, (B.A.P. 9th Nev. 1982), an order relying on § 105 should relate how it was necessary or appropriate to carry out § 105's purpose. 22 B.R. at 67. Since the purpose in the instant case was in fact the conduct of the *state* foreclosure sale, § 105 affords no authority for overriding the *state* constitution.

Finally the Illinois Appellate Court turned to *Brown v. Buchanan*. 419 F. Supp. 199 (E. D. Va. 1975), a pre-*Butner*

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[2]West U.S.C.A. 1989 Supplementary Pamphlet pp. 40-41, note "Effective Date of 1986 Amendments."

case, as the definitive authority that Article I, § 8 of the United States Constitution and "any" bankruptcy laws suspend any state law in conflict with them. While it is evident that the Constitution has placed the bankruptcy power in the federal government, all that the *Brown* court was faced with—and in fact decided—was the issue of whether federal law or state law should set the burden of proof in a federal bankruptcy proceeding as to non-dischargeability of a debt due to debtor's fraud. No question of a court order overriding a state Constitution was presented.

2. The State Law Issues in the Opinion Below Do Not Mitigate Against the Grant of Certiorari and Summary Reversal.

The need to correct the affront to the *Butner* ruling is sufficient reason alone to grant Petitioner the relief sought. However, there is further rationale for not concluding that state issues in the opinion preclude relief.

First, a careful reading of the opinion below indicates that the federal question basis of the ruling was critical. The primary state law issue, in the words of the court, was whether or not the sale had been conducted in violation of the Illinois Constitution. (A.2.) The Appellate Court, while trying to be discrete and obscure about it, decided that question in Petitioner's favor, based on the language of the Illinois Constitution and the court's earlier holding in *Factor v. Factor*, 27 Ill. App. 3d 594, 327 N.E.2d 396 (1st Dist. 1975). In the opinion below, the court stated: (A.4.): "The *Factor* court held that article VI, section 14 of the 1970 Illinois Constitution prohibits the appointment of a commissioner for purposes of selling real estate." However, the court below, evidently reluctant to award victory to a debtor-mortgagor, declined to proceed to grant the relief which the *Factor* court had granted. The *Factor* court, in disallowing a sale by a commissioner, held:

> Plaintiff contends that the court has broad discretion in approving judicial sales. . . . However, this statement

> applies to the broad discretion held by courts in connection with the approval of judicial sales. *Under no circumstances can the application of this principle justify a violation of clear constitutional and statutory provisions.* It follows that the order of August 22, 1974 was improvidently entered. It is reversed and cause remanded for further proceedings not inconsistent with this opinion. [Emphasis added]

Factor, 327 N.E.2d, at 399.

Similarly, Illinois Courts have held that a judicial sale is void when the basis for the defect (i.e. in the instant case a sale in violation of the explicit language of the Illinois Constitution) appears on the face of the record. *City of Chicago v. Cosmopolitan National Bank*, 120 Ill. App. 3d 364, 458 N.E.2d 11 (1st Dist. 1983).

Left with the dilemma of having to rule for Petitioner on the sole issue which the court said was before it, the court embraced federal preemption as an anchor for its ruling. The aspects of the opinion regarding collateral attack, and purported failure to meet the standards of Ill. Rev. Stat. Ch. 110 § 2-1401 to vacate a judgment should be reconsidered by the Illinois Appellate Court in light of a correct understanding of federal law. In light of *Butner*, reliance by the court on the federal question taken with the explicit language of *Factor*, renders the state law arguments not adequate and independant bases for the ruling. The mere recitation of several areas of law is insufficient basis to defeat certiorari.[3] Just as in *Butner*, (440 U.S., at 58), this

[3]In *Norfolk & Western Railway Co. v. Liepelt*, 444 U.S. 490 (1979), the state court in its opinion posited four separate bases for its damages award, 62 Ill. App. 3d 653, 378 N.E.2d 1232, 1245-1247 (1st Dist. 1978.) Respondents opposed certiorari in that case on the basis of failure to establish a substantial federal question. (Brief in Opposition to Petitioner's Application for a Writ of Certiorari at pp. 2, 7-10) but this Court in that case identified the federal issue as appropriate for resolution and granted certiorari.

Court need not pass on the state law issues, but should nevertheless act to correct the conflict with its decision.

The court below also suggested that it could not rule for Petitioner because Petitioner had "consented" to the order[4] (A.6.); had argued other issues first and had delayed seeking relief.[5] Arguing other issues hardly justifies a ruling contrary to *Butner*.

Finally (A.6 – A.7.) the court stated that Petitioner had shown no prejudice from potential purchasers participating in a sale which could later be declared void. However, this Court rejected a similar argument in *Stellwagen v. Clum*, 245 U.S. 605 (1918): "Congress did not intend to permit a conveyance such as here involved to stand which creditors might attack and avoid under the state law." (245 U.S., at 618.)

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[4]It is black letter state and federal law that erroneous stipulations of law may be set aside. This Court has held that it cannot be controlled by agreement of counsel on a subsidiary question of law. Nor will the fact that a stipulation was given effect by the state courts bind this Court. *Swift & Co. v. Hocking Valley Ry. Co.*, 243 U.S. 281, 289 (1917). In *Brink v. Industrial Com.*, 368 Ill. 607, 15 N.E.2d 491, 492 (1938), the Illinois Supreme Court sustained an order setting aside an erroneous stipulation that the Workman's Compensation Act, and not FELA, governed an injured workman's claim. See also *People of the State of Illinois v. Polk*, 115 Ill. App. 3d 1011, 451 N.E.2d 579, 580 (3rd Dist. 1983), setting aside an erroneous stipulation of law in response to a seasonably made motion. The *Polk* court noted that an agreed-to order is not literally a stipulation, but held that there was no meaningful distinction. (id. 580.) Also supporting the proposition that erroneous stipulations of law are not binding are: *Equitable Life Assur. Soc. v. MacGill*, 551 F.2d 978 (5th Cir. 1977); *First Nat. Bank & Trust Co. v. Jones*, 61 F. Supp. 364 (W.D. Okla. 1945); The failure to seek relief promptly is not determinative *Logan Lumber v. Comm. of Int. Rev.*, 365 F.2d 846 (5th Cir. 1966).

[5]A void judgment may be attacked at any time. *Reynolds v. Burns*, 20 Ill. 2d 179, 192, 170 N.E.2d 122 (1960); *In re Petition of Stern*, 2 Ill. App. 2d 311, 120 N.E.2d 62 (1st Dist. 1954); *City of Chicago v. Fair Employment Practices Com.*, 65 Ill. 2d 108, 357 N.E.2d 1154 (1976).

While the necessity of reversing the opinion because of the conflict with *Butner* is dispositive, the manner in which the state law and federal law issues were discussed in this case does not preclude granting certiorari. In *United Airlines v. Mahin,* 410 U.S. 623 (1973), this Court held: "The possibility that the state court might have reached the same conclusion if it had decided the question purely as a matter of state law does not create an adequate and independent state ground that relieves this Court of the necessity of considering the federal question." (410 U.S. at 630-631).[6] The state court's interpretation of state law has been influenced by the erroneously broad interpretation of federal law in the instant case.

3. Appropriate Relief Can Be Provided by Granting Certiorari, Vacating and Remanding.

Because the opinion below is so strikingly wrong on the federal issue this Court can do justice by granting certiorari

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[6]In *Three Affiliated Tribes v. Wold Engineering, P.C.,* 467 U.S. 138, 152 (1984), This Court amplified that concept.

> It is equally well established, however, that this Court retains a role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law. In some instances, a state court may construe state law narrowly to avoid a perceived conflict with federal statutory or constitutional requirements. See, *e.g., United Airlines, Inc., v. Mahin,* 410 U.S. 623, 630-632 (1973); *State Tax Comm'n v. Van Cott,* 306 U.S. 511, 513-515 (1939); *Red Cross Line v. Atlantic Fruit Co.,* 264 U.S. 109, 120 (1924); see also *San Diego Building Trades Council v. Garmon,* 353 U.S. 26 (1957). In others, in contrast, the state court may construe state law broadly in the belief that federal law poses no barrier to the exercise of state authority. See, *e.g., Standard Oil Co. v. Johnson,* 316 U.S. 481 (1942). In both categories of cases, this Court has reviewed the federal question on which the state-law determination appears to have been premised. If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so that the court may reconsider the state law question free of misapprehensions about the scope of federal law.

and entering summary reversal under Sup. Ct. R. 23.1 on the federal question, vacation of the judgment and a remand to the Illinois Appellate Court with instructions to rehear the case in light of proper resolution of the federal question. The *Butner* case is controlling, the Petitioner's state law property rights must be resolved by application of state property law without misapprehension and misunderstanding of federal preemption. This Court has embraced such summary relief in appropriate cases. *Mason v. City of Biloxi*, 385 U.S. 370 (1966); *Rogers v. Calumet Nat. Bank of Hammond*, 358 U.S. 331 (1959). Stern, Gressman and Shapiro, Supreme Court Practice § 5.12 p. 277 (6th Ed. 1986) has summarized the law in the area of summary disposition on the merits well:

> This kind of reversal order usually reflects the feeling of a majority of the Court that the lower court result is so clearly erroneous, particularly if there is a controlling Supreme Court precedent to the contrary, that full briefing and argument would be a waste of time.

4. The Questions Are Important.

A. *Butner* is ignored.

This Court has clarified the relationship between federal bankruptcy law and state property law on several occasions. *Butner v. United States, supra, Stellwagen v. Clum, supra.* To be blunt, what is the point of this Court clarifying the bankruptcy/state property law relationship if the clarification is to be ignored? This case is so clear that a Sup. Ct. R. 23.1 summary reversal is called for and is appropriate.

Secondly, Illinois is a major commercial state. The opinion below will inevitably tend to introduce disorder where

Butner left clarity.[7] In this era of Lexis and Westlaw, the careless and incorrect holding of the Appellate Court "will out."

[7]Baird, *Loss Distribution, Forum Shopping, and Bankruptcy: A Reply to Warren,* 54 U. Chi. L. Rev. 815 (1987), expresses the importance of *Butner* thusly (p. 818 fn. 3):

> The importance Jackson and I have always attached to the problem is evident in our choice of *Butner v. United States,* 440 U.S. 48 (1979), at the start of our casebook on bankruptcy. *Butner* arose under the 1898 Bankruptcy Act and dealt with an obscure feature of North Carolina real property law. Notwithstanding its lack of substantive relevance, we have always taught the case first in our bankruptcy course because *Butner* recognizes explicitly that departing from nonbankruptcy rules in bankruptcy introduces the problem of forum shopping and holds that bankruptcy rules should depart from nonbankruptcy rules only if some specific *bankruptcy* policy justifies it.

CONCLUSION

Because of the inconsistency of the decision below with *Butner v. United States, supra,* the petition for a writ of certiorari should be granted and summary reversal pursuant to Sup. Ct. R. 23.1 should be granted.

Respectfully submitted,

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March, 1990

APPENDICES

OPINION OF THE ILLINOIS APPELLATE COURT

FOURTH DIVISION
FILED: 6/22/89.

No. 1-87-1339

TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND,

Plaintiff,

v.

LASALLE NATIONAL BANK, as Trustee Under Trust Agreement Dated 12/18/75 and known as Trust No. 21599, *et al.*,

Defendants.

WAYNE JACKSON,

Petitioner-Appellant,

v.

TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and JOHNSTOWN/CONSOLIDATED REALTY TRUST f/k/a CONSOLIDATED CAPITAL INCOME OPPORTUNITY TRUST,

Respondents-Appellees.

APPEAL from the Circuit Court of Cook County Honorable THOMAS J. O'BRIEN, *Presiding.*

JUSTICE JOHNSON delivered the opinion of the court: Petitioner, Wayne Jackson, appeals from an order of the circuit court of Cook County denying his petition to void the sale of commercial property located in Chicago, Illinois. The sole issue presented for review is whether the trial court erred in failing to find that it lacked statutory jurisdiction to appoint a commissioner to conduct a sale of real estate subject to a mortgage foreclosure judgment.

We affirm.

Petitioner is the sole general partner of an Illinois limited partnership that held 100% of the beneficial interest in American Land Trust. American Land Trust held legal title to the commercial office building that was the subject of the action in foreclosure. The property was encumbered by three mortgage liens as of January 3, 1986. The first mortgage was held by respondent Trustees of Central States, Southeast and Southwest Areas Pension Fund. Lincoln National Pension Insurance Company held the second mortgage. The third mortgage was held by Johnstown/Consolidated Realty Trust also a respondent. These mortgages secured a principal amount of debt in excess of $12 million.

Petitioner's partnership defaulted on the mortgage payments and respondents and Lincoln filed to foreclose their mortgage lien on the property. Petitioner's partnership then filed a Chapter 11 voluntary bankruptcy on February 13, 1986. On April 28, 1986, an agreed bankruptcy order was entered which set the terms of an agreed order of foreclosure for the judicial sale of the property. Petitioner's partnership was given a grace period in which to find a third party purchaser for the property. The partnership failed to find a purchaser within the specified period of time.

On June 13, 1986, the agreed order for judgment of foreclosure was entered. This order and the agreed bankruptcy order called for the judicial sale of the property on July 7,

1986. A commissioner was appointed by the trial court to take bids on the property in the bankruptcy court. This allowed the bankruptcy judge to observe the sale. The sale took place on July 24, 1986. Johnstown/Consolidated Realty Trust was the only bidder at $10.4 million. On August 15, 1986, respondents and Lincoln jointly moved to confirm the sale. The sale was confirmed on September 3, 1986.

Petitioner then filed a petition to set aside the order confirming sale and to void the commissioner's sale on December 16, 1986, more than 3 months after the sale had been confirmed. Petitioner argued that the sale was void because although the agreed foreclosure order was entered in circuit court, the sale was held on Federal property in a bankruptcy courtroom. On January 15, 1987, after the property was sold to a third party purchaser, petitioner filed an amendment to set aside the order confirming sale, to void the commissioner's sale, and to void a portion of the judgment foreclosure.

On March 3, 1987, the amended petition was denied. The court found that its order of June 13, 1986, was not void, and that there were no grounds to vacate since the June 13 order was entered with petitioner's consent, and no motion to vacate was filed until 6 months after its entry. This appeal followed.

Petitioner contends that the court order confirming the sale of the real estate is void and, therefore, subject to collateral attack. "Any petition to vacate an order, judgment or decree filed more than 30 days after entry thereof, even though made to the court that rendered it, constitutes collateral attack." (*People v. O'Keefe* (1960), 18 Ill. 2d 386, 391.) In the case of collateral attack all presumptions are in favor of the validity of the attacked judgment, and the face of the record. (*Schaller v. Trustees of Schools* (1978), 67 Ill. App. 3d 857, 866.) In the area of judicial sales, collateral attacks

are limited to sales which are void because of a lack of jurisdiction of the court over the subject matter or person or due to fraud in procuring the sale. *City of Chicago v. Central National Bank* (1985), 134 Ill. App. 3d 22, 26.

In the instant case there are no allegations of fraud in the sale proceedings nor is there a claim that the court lacked subject matter or personal jurisdiction over the sale. Petitioner maintains that the trial lacked statutory jurisdiction to appoint a commissioner to conduct the sale pursuant to article VI, section 14 of the 1970 Illinois Constitution. Section 14 provides, in pertinent part, that "[t]here shall be no fee officers in the judicial system." Ill. Ann. Stat., 1970 Const., art. VI, §14.

Petitioner cites *Factor v. Factor* (1975), 27 Ill. App. 3d 594 to support his proposition that it is jurisdictional error for the court to appoint a commissioner to conduct the sale in question. (*Factor,* 27 Ill. App. 3d at 597.) *Factor* was a post-dissolution of marriage proceeding which involved the direct appeal of a contested court order directing a commissioner to conduct the private judicial sale of marital property. The *Factor* court held that article VI, section 14 of the 1970 Illinois Constitution prohibits the appointment of a commissioner for the purpose of selling real estate. *Factor,* 27 Ill. App. 3d at 597.

Petitioner asserts, pursuant to *Factor,* that the sale was void because the trial court lacked statutory authority to appoint a commissioner. However, even if the trial court lacked statutory authority to appoint a commissioner, the error would not be jurisdictional. The error would result in a voidable judgment and would not, therefore, be the proper subject of a collateral attack. *Stark v. Stark* (1955), 7 Ill. App. 2d 442, 444; *Phillips v. O'Connell* (1947), 331 Ill. App. 511, 528-29.

The case at bar is analogous to the situation in *Phillips v. O'Connell* (1947), 311 Ill. App. 511. In *Phillips*, a belated objection was made to the appointment of a special commissioner on the grounds that the trial court lacked statutory authority to refer chancery matters to a special commissioner. The appellate court held that the trial court properly had jurisdiction of the subject matter and the parties and that the improper reference resulted in a proceeding that was voidable at most. We, therefore, find that the trial court did not err in finding that the appointment of a commissioner to take bids at the sale in question did not result in a void proceeding.

Further, the case at bar also involves the jurisdiction of the Federal bankruptcy court. The agreed bankruptcy order entered in Federal bankruptcy court provided for the appointment of a commissioner to conduct the sale by requiring entry of the agreed foreclosure order which provided for the appointment of a commissioner. Respondents are correct in their assertion that the agreed bankruptcy order supersedes the applicable state law regardless of any alleged impropriety of the sale by an appointed commissioner.

"The [bankruptcy] court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of the title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, *sua sponte*, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process." 11 U.S.C.A. §105(a) (West Supp. 1989).

"Article I, section 8 of the United States Constitution provides that the Congress shall have power to establish uniform bankruptcy laws throughout the Nation. Any such

laws promulgated by the Congress operate to suspend any state law in conflict with them. [Citations.]" (*Brown v. Buchanan* (E.D. Va. 1975), 419 F. Supp. 199, 201.) We, therefore, find that the appointment of the commissioner pursuant to the agreed bankruptcy order entered by the Federal bankruptcy court was valid even if the Illinois Constitution were to be construed so as to prohibit the appointment of the commissioner in these circumstances.

Finally, we will address vacation of the order confirming the sale pursuant to section 2-1401 of the Code of Civil Procedure. (Ill. Rev. Stat. 1985, ch. 110, par. 2-1401.) The trial court, after finding that the order of June 13, 1986, was not void, also concluded that petitioner did not meet the requirements of section 2-1401 to have the order vacated on equitable grounds. A 2-1401 petition invokes the court's equitable power to vacate a judgment attended by unfair, unjust or unconscionable circumstances and it is incumbent on the petitioner to show that his meritorious defense was diligently brought to the court's attention. *City of Chicago v. Central National Bank* (1985), 134 Ill. App. 3d 22, 25.

We are in agreement with the trial court that petitioner failed to diligently protect his alleged rights. Since the order was entered with petitioner's consent, the motion to vacate was not raised until 6 months after its entry, and petitioner objected to confirmation of the sale on other grounds, we find that the trial court did not err in denying petitioner's petition to set aside the order confirming the sale and voiding the commissioner's appointment.

Petitioner also alleges that the commissioner's taking of the bids in the foreclosure sale prejudiced him because it dissuaded potential purchasers from participating in a sale which would later be declared void. This argument, however, assumed that petitioner's posture is legally correct. We find,

to the contrary, that petitioner's argument is without merit and, therefore, petitioner was not prejudiced by the appointment of the commissioner.

For the foregoing reasons, the judgment of the circuit court is affirmed.

Affirmed.

LINN and MCMORROW, JJ., concur.

ORDER AND MANDATE OF THE ILLINOIS SUPREME COURT

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the thirteenth day of November, 1989.

Present: THOMAS J.MORAN, *Chief Justice*

Justice DANIEL P. WARD
Justice WILLIAM G. CLARK
Justice JOHN J. STAMOS
Justice HOWARD C. RYAN
Justice BEN MILLER
Justice HORACE L. CALVO

On the fifth day of December, 1989, the Supreme Court entered the following judgment:

No. 69186

WAYNE JACKSON,
Petitioner

v.

TRUSTEES OF CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND, and JOHNSTOWN/CONSOLIDATED REALTY TRUST f/k/a CONSOLIDATED CAPITAL INCOME OPPORTUNITY TRUST,
Respondents

Petition for Leave to Appeal from Appellate Court First District
1-87-1339
86CH73

The Court having considered the Petition for Leave to Appeal and being fully advised of the premises, the Petition for Leave to Appeal is DENIED.

As Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, I certify that the foregoing is a true copy of the final order in this case.

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court, this twenty-seventh day of December, 1989.

JULEANN HORNYAK
Clerk,
Supreme Court of the State of Illinois

EXCERPTS FROM THE RECORD

Excerpt From the Bankruptcy Court Order of April 29, 1986 (C 475):

* * *

2. The automatic stay is hereby modified to permit the Secured Creditors to foreclose their Security Documents in the Foreclosure Action. The Debtor is authorized and directed to execute the Joint Decree of Foreclosure and Sale of the Premises in substantially the form attached hereto as *Exhibit B*, which provides for the foreclosure sale of the Premises, for cash (subject to the liens of real estate taxes if applicable) at 10:00 a.m. on July 7, 1986 ("Sale Date") . . .

* * *

Excerpts from the State Court Order of June 13, 1986 (C 613-616):

* * *

5. This Court hereby appoints Bruce J. Waldman to be the Commissioner ("Commissioner") to sell the Property and to perform the other services otherwise to be performed by the Sheriff, and the Commissioner shall receive reasonable compensation for his disbursements and for his services from the proceeds of sale of the Property . . . taking into account his customary rates for such services.

* * *

[T]he Property . . . shall be sold at public sale, to the highest bidder for cash, by the Commissioner at 10:00 a.m. local Chicago time on July 7, 1986 . . . in the Courtroom occupied by the Honorable Robert L. Eisen, 16th floor, Dirksen Federal Building. . .

* * *

7. [T]he Commissioner . . . shall execute and deliver to the purchaser . . . a good and sufficient deed of conveyance of the Property.

* * *

8. The Commissioner . . . shall make distribution in the following order of priority:

   (a) to the Commissioner for his fees, disbursements, and commission on such sale . . .

Excerpt from the *"Joint Brief of Appellees Johnstown/Consolidated Realty Trust and Trustee of Central States Southeast and Southwest Area Pension Fund,"* filed in the Appellate Court of Illinois, pp. 28–30.

IV. The Order Of A Federal Bankruptcy Court Validly Appointed A Commissioner To Conduct The Sale.

The Agreed Bankruptcy Order entered by Chief Bankruptcy Judge Eisen provided for the appointment of a commissioner to conduct sale, by requiring entry of the Agreed Foreclosure decree which provided for the appointment of a commissioner. Regardless of the propriety of a sale by a commissioner under Illinois law, the Agreed Bankruptcy Order supersedes any applicable state law and therefore validates the appointment of a commissioner.

Federal bankruptcy law clearly supersedes state law. As stated in *Brown v. Buchanan (In re Brown),* 419 F.Supp. 199, 201 (E.D. Va. 1975):

> "Article I, section 8 of the United States Constitution provides that the Congress shall have power to establish uniform bankruptcy laws throughout the Nation. *Any such laws promulgated by the Congress operate to suspend any state law in conflict with them. Stellwagen v. Clum,* 245 U.S. 605, 38 S.Ct. 215, 62 L.Ed 507 (1918) [further citations omitted; emphasis added].

The authority by which Chief Bankruptcy Judge Eisen entered the Agreed Bankruptcy Order is contained in section 105(a) of the Bankruptcy Code, 11 U.S.C. §105(a), which is denominated "Power of court." This section provides, in relevant part, that "The [bankruptcy] court may issue *any* order, process or judgment that is necessary or appropriate to

carry out the provisions of this title . . .".[4] 11 U.S.C. § 305(a) (emphasis added). The Agreed Bankruptcy Order advanced the paramount bankruptcy purposes of adjudicating lien validity (11 U.S.C. §506), administering an asset by sale (11 U.S.C. §363) or by foreclosure (11 U.S.C. §362), resolving a controversy to appoint an examiner and modify stay (Bankruptcy Rule 9019), and providing payment to creditors. To the extent, if any, that these federal bankruptcy purposes were achieved by a procedure which contravened state law, then such contrary state law is simply overridden. Irrespective of state law, the appointment of a commissioner to conduct the instant foreclosure sale was valid because it was required by an order of the bankruptcy court. Thus, Jackson's appeal must be denied.

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[4] Although the order was agreed, its entry by Judge Eisen is an independent imprimatur of its contents by the bankruptcy court. *Cf. Anderson v. Bessamer,* 470 U.S. 564, 572 (1985) where the Supreme Court held that even where findings of fact presented by a prevailing party are adopted verbatim by the court, the findings are those of the court.